Supreme Court, U.S.
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In The
Supreme Court of the United States

CRAWFORD ZIEGLER, III,

Petitioner,

vs.

STATE OF ALABAMA,

Respondents.

On Petition For A Writ Of Certiorari
To Review The Decision of the
Court of Criminal Appeals of Alabama

PETITION FOR WRIT OF CERTIORARI

COUNSEL FOR PETITIONER:
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QUESTIONS PRESENTED FOR REVIEW

I. (A) Whether the Court of Criminal Appeals of Alabama committed reversible error when it affirmed the denial of Petitioner's Motion to Dismiss a felony warrant and felony indictment issued pursuant to 32-5A-191 (a) and 32-5A-191 (h), Code of Alabama 1975, as amended, and/or Petitioner's Motion For Acquittal/To Vacate his conviction and sentence for felony DUI, when, as here, the evidence shows that the felony warrant and affidavit upon which the indictment is based were unsworn documents, failed the felony probable cause test, failed to disclose that the warrant is based upon anyone's personal knowledge, and failed to predicate the charged offense upon prior guilty plea convictions shown to be knowingly and voluntarily given. The Petitioner contends that said indictment, warrant and conviction is contrary to the Fourth and Fourteenth Amendments to the United States Constitution and relevant decisions of this Court.

(B). Whether the utilization of four (4) prior D.U.I. guilty plea convictions as an element of the felony charged under 32-5A-191 (a) and 32-5A-191 (h) Code of Alabama 1975, represents a Fourteenth Amendment Due Process violation, when, as here, the guilty pleas to the DUI charges were not affirmatively shown to be knowingly and voluntarily given. The Petitioner contends that the DUI guilty pleas required for application of 32-5A-191 (a) and 32-5A-191 (h) Code of Alabama 1975, became an

element of the Alabama felony DUI statute thereby requiring the State to show that said pleas were knowingly and voluntarily given. Petitioner contends that the State failed to do so contrary to the Fourteenth Amendment to the United States Constitution and relevant decisions of this Court.Evidence seized and obtained by police officers in violation of the Fourth and Fourteenth Amendments to the United States Constitution and found that Petitioner's wife voluntarily consented to a search of Petitioner's residence contrary to relevant decisions of this Court. The Petitioner contends that the search and seizure does not qualify as a search incidental to arrest and that the totality of the circumstances and evidence presented at his Motion to Suppress hearing below clearly reveals that a person exercising "reasonable caution" could not find the consent to search his residence "voluntary."

II. Whether the indictment and conviction of Petitioner under 32-5A-191(a) and 32-5A-191(h), Code of Alabama 1975, so deprived Petitioner of a defense to said charge, as to constitute a prosecution and conviction of Petitioner by application of a ex post facto law contrary to Article 1 § 9, Cl. 3 of the Constitution of the United States. Petitioner contends that convictions predating the 1997 statute cannot be used because they deprive him of a defense that previously existed.

PARTIES TO THE PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Crawford Ziegler, petitions this Court for a Writ of Certiorari to review a Judgment and Order of the Court of Criminal Appeals of Alabama affirming his State Court conviction for the offense of felony DUI, under 32A-5A-191(a) and 32-5A-191(h) *Code of Alabama 1975.* Petitioner contended at trial and on appeal to the Alabama Court of Criminal Appeals that the appropriate procedure for obtaining a felony warrant and indictment on the charge of felony DUI was not followed, contrary to the Fourth and Fourteenth Amendments to the United States Constitution; that the prior guilty plea convictions used to obtain a warrant, a felony indictment, a felony conviction and to enhance the sentence were elements of the felony charged. He contends that the DUI guilty pleas were not appropriately counseled and not shown to be voluntary guilty pleas as mandated by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 LEd 2d 274 (1969) contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Moreover, Petitioner alleged; that his indictment, conviction and sentence under the Alabama Felony DUI Statute constitutes the application of an ex post facto law by denying him a defense that had previously existed by prohibiting the State from using certain prior convictions of misdemeanor DUI offense to enhance punishment, etc., where such convictions were obtained more than five (5) years prior to a felony DUI charge. Petitioner contends that said statute violates Article 1, § 9, Cl. 3, Constitution of the United States.

OPINIONS BELOW

1. The Opinion of the Court of Criminal Appeals of Alabama affirming the conviction, sentence and imposition of fines by the Circuit Court, and adjudicating the Constitutional issues in Crawford Ziegler, III, vs. State of Alabama, CR-99-1006 has not been reported. The opinion is dated February 23, 2001, and appears at Appendix A, p. 1-9.

2. The Order of the Court of Criminal Appeals of Alabama in Crawford Ziegler, III, vs. State of Alabama, CR-99-1006, overruling Petitioner's Application for Rehearing and denying Petitioner's Motion to Review and Include Additional Facts Under Rule 39(k), Alabama Rules of Appellate Procedure, was not reported. The Order is dated March 16, 2001, and appears at Appendix B, p. 10.

3. The Order of the Supreme Court of Alabama denying Ziegler's Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama in Supreme Court case Ex parte Crawford Ziegler, Sup.Ct.No. 1001136 has not been reported. The Order is dated May 25, 2001, and appears at Appendix C, p. 11-12.

JURISDICTION

The Judgment of the Court of Criminal Appeals of Alabama adjudicating an issue presented under the Fourth

and Fourteenth Amendments to the United States Constitution was entered on February 23, 2001, Appendix A, p. 1-9. A rehearing was sought in the Court of Criminal Appeals of Alabama and denied on March 16, 2001, Appendix B, p. 10. A Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama was sought in the Supreme Court of Alabama. The Supreme Court of Alabama denied the Petition for a Writ of Certiorari to the Court of Criminal Appeals of Alabama on May 25, 2001, Appendix C, p. 11-12. A rehearing was not required or sought in the Supreme Court of Alabama. The jurisdiction of this Court is invoked under 28 USC § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment, United States Constitution.

2. The Fourteenth Amendment, United States Constitution.

3. Article 1, § 9, Cl. 3, United States Constitution.

4. The statute under which Petitioner was prosecuted was 32-5A-191 (a) and 32-5A-91 (h), *Code of Alabama* 1975. The text of the statute appears at Appendix D, p. 13-15.

STATEMENT OF THE CASE

The facts necessary to the questions now raised are stated as follows:

A. Course of Proceedings:

The Petitioner, Crawford Ziegler, was arrested on April 23, 1999. He was initially charged with various outstanding warrants and the misdemeanor offense of DUI. The misdemeanor DUI was called for trial before the District Court of Montgomery County, Alabama, on May 6, 1999. The State of Alabama, at that time, moved for a Continuance of the Case, which Motion was granted by the District Court. On July 28, 1999, pursuant to an alleged affidavit and felony warrant, Defendant Ziegler was charged with the offense of felonious driving under the influence, pursuant to 32-5A-191(a) and 32-5A-191(h), *Code of Alabama 1975*. The Affidavit and Warrant were presented to The Grand Jury of Montgomery County, Alabama, during its October Term, 1999. On October 14, 1999, The Grand Jury of Montgomery County, Alabama, indicted Petitioner for the offense of felonious driving under the influence.

The felony DUI case was set for Trial on January 24, 2000. Thereafter, Defense Counsel moved to suppress, etc., and a Motion to Dismiss the indictment was made. Defendant's Motions, by agreement, were taken under advisement by the Circuit Court of Montgomery County, Alabama. Mr. Ziegler, on the date scheduled for Trial, waived his rights to a Trial by Jury, consented to a Judge Trial and agreed that the Court should reserve ruling on his Motion to Dismiss the Indictment,

until all evidence had been presented.

The case was tried before the Circuit Court of Montgomery County, Alabama, on January 24, 2000. After hearing the evidence and legal arguments of Counsel, the Court denied the Motion to Dismiss as filed by Petitioner, found Petitioner guilty of felonious driving under the influence and set a Sentencing Hearing for February 22, 2000. Defense Counsel then filed a Motion for Judgment of Acquittal/To Vacate alleging that: (1) The felony warrant and the indictment were not based on probable cause. That is, the State failed to present legal evidence based on an affidavit setting out probable cause and a source of personal knowledge when it obtained an unsworn warrant, unsworn affidavit and the indictment. Since the unsworn warrant and affidavit were presented to the Grand Jury, Ziegler alleged that the State failed to present evidence before the Grand Jury that he had committed a felony offense and that the former guilty plea convictions used by the State to obtain the felony warrant, indictment, conviction and sentence were an element of the felony charge and were not shown to be knowingly and voluntarily obtained as required by Boykin v State of Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 LEd 2d 274 (1969) contrary to both the Fourth and Fourteenth Amendments to the United States Constitution; Ziegler also alleged that application of the statute deprived him of a defense and constitutes a prosecution, conviction and sentence obtained by application of an ex post facto law contrary to Article 1, § 9, Cl. 3, Constitution of the United States..

The Motion for Judgment of Acquittal/To Vacate was denied on February 22, 2001. The Petitioner was then

sentenced to a term of five years imprisonment, split to serve 18 months and two (2) years on probation, fined a sum of $4,100.00 and ordered to surrender his driver's license for a period of five (5) years. Ziegler appealed to the Court of Criminal Appeals of Alabama, which affirmed the Trial Court's Judgment on February 23, 2001.

A Petition for a Writ of Certiorari was timely filed with the Supreme Court of Alabama but denied on May 25, 2001. This Petition is filed within ninety (90) days of the Judgment or Order of the Supreme Court of Alabama denying a Petition for Writ of Certiorari to Review the Judgment and Order of the Alabama Court of Criminal Appeals. Moreover, this Petitioner seeks relief pursuant to both the Fourth and Fourteenth Amendments to the Constitution of the United States and Article 1, § 9, Cl. 3, Constitution of the United States.

B. Specific Facts Necessary for a Review of the Constitutional Issues Involved.

Mr. Crawford Ziegler was arrested on April 23, 1999, by an Alabama State Trooper for various outstanding warrants and later that day charged with the misdemeanor offense of Driving Under the Influence of Alcohol (R-17-24). The Petitioner now concedes that the Alabama State Trooper, Mr. Scott Duncan, had probable cause to make the initial arrest[1]. The misdemeanor DUI offense was called for Trial by the District Court of Montgomery County, Alabama, on May 6,

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[1]Petitioner was initially arrested on various outstanding warrants, not associated with the proceedings below.

1999. At this time and place, the District Attorney of Montgomery County, Alabama, moved for a General Continuance of the case, which was granted. On July 28, 1999, Alabama State Trooper, Scott Duncan, gave an alleged Affidavit in support of a felony warrant charging Petitioner with the offense of felonious driving under the influence contrary to 32-5A-191 (a) and 32-5A-191(h) *Code of Alabama* 1975 (R-30-34). Thereafter, Petitioner was arrested for the felony offense charged by the warrant. The warrant alleged that Petitioner had been previously convicted of at least four (4) DUI charges. This felony warrant and alleged affidavit was presented to the Montgomery County Grand Jury during its October Term, 1999. Based on this felony warrant and affidavit, the Montgomery County Grand Jury issued an Indictment charging the Petitioner with the offense of felonious driving under the influence. The Indictment was issued on October 14, 1999. The offense must be proven by showing, as an element of the felony offense, that the Defendant has been previously convicted of four, or more, misdemeanor DUI offenses. The Circuit Court of Montgomery County, Alabama, set this matter for Trial on January 24, 2001. Defense Counsel moved to Dismiss the Indictment alleging, among other things: that the felony indictment of Petitioner for DUI violated both the Fourth and Fourteenth Amendments to the Constitution of the United States in that the arrest and Indictment of Petitioner for the offense was not predicated upon a valid sworn felony warrant, affidavit, or an indictment based upon probable cause. Ziegler contended that the warrant and affidavit were unsworn and

that the affidavit did not set forth sufficient facts to show that probable cause existed for a felony warrant or indictment under 32-5A-191 (a) and 32-5A-191 (h) Code of Alabama 1975. Moreover, he alleged that they did not disclose the source of any personal knowledge relied upon to obtain the warrant. He also contended that the warrant and indictment were based on prior guilty plea convictions not appropriate for such purposes contrary to Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 LEd 2d 274 (1969) (R-34-42). He contends that prior guilty plea convictions was an element of the felony offense and cannot be so proven unless shown to be knowingly and voluntarily entered. Moreover, since the warrant and affidavit of Trooper Duncan was used to obtain the felony indictment, Defendant alleged that the indictment was not based upon probable cause.

The case was called for Trial on January 24, 2001. On said date, Ziegler waived a trial by jury, consented to a trial by the Court and agreed that the Trial Court hear all evidence before entering its Order on the Motion to Dismiss. The State then called two (2) principal witnesses. The State of Alabama called Mr. Scott Duncan as its first witness. Mr. Duncan testified that he was an Alabama State Trooper and had been so employed for three (3) years (R-16-17). Mr. Duncan further testified that he was on patrol in Montgomery County, Alabama, on April 23, 1999, and noticed a car driving south on U.S. Highway 231 at a speed of approximately forty (40) miles per hour. The car was being driven by Mr. Crawford Ziegler, the Petitioner. Trooper Duncan stated that the car began to weave and he, thereafter, stopped the vehicle in order to check the situation

(R-17-19). Upon approaching the car, Mr. Duncan smelled a strong odor of alcohol and, in fact, saw alcohol present in the vehicle. After obtaining the identification of Petitioner, Trooper Duncan reported his stop by radio and found that existing warrants were outstanding for Mr. Crawford Ziegler (R-23-24). Trooper Duncan then arrested Mr. Ziegler on these warrants and proceeded to the Montgomery County Jail. After execution of the warrants at the jail, Trooper Duncan then gave Mr. Ziegler a field sobriety test in the hallway of the jail. The test consisted of a heel and toe test and a one-leg stand. Trooper Duncan stated that Mr. Ziegler failed both tests and was then arrested for the misdemeanor offense of Driving Under the Influence of Alcohol (R-23-26). This misdemeanor case was set for Trial on May 6, 1999, but Continued on Motion of the State. Trooper Duncan then testified that he was approached by the District Attorney's Office on or about July 28, 1999, concerning a proposed affidavit. Mr. Duncan testified that he executed a document in the form of a proposed affidavit concerning his arrest of Mr. Ziegler. Thereafter, a felony warrant, based on this Affidavit, was obtained in order to arrest Mr. Crawford Ziegler for violation of 32-5A-191(a) and 32-5A-191(h) Code of Alabama 1975. The arrest was made and Mr. Ziegler was thereafter indicted by the Grand Jury of Montgomery County, Alabama. On cross-examination, Trooper Duncan testified that the Affidavit that he executed on July 28, 1999, stated only facts that he knew at the time of the arrest of Mr. Ziegler for the misdemeanor D.U.I. He testified that the matter concerning prior offenses committed by Mr. Ziegler was not a part of his knowledge at the time of the

Affidavit. Furthermore, he stated that he was not placed on oath at the time of the issuance of the Affidavit and Warrant. Trooper Duncan then admitted that the only factual matter that he was aware of at the time of making the Affidavit concerned the events surrounding the arrest of Mr. Ziegler on the afternoon of April 23, 1999, and did not concern knowledge of prior DUI offenses committed by Mr. Ziegler (R-30-34). Defense Counsel requested that the Court dismiss the Indictment in that the Warrant improperly charged Mr. Ziegler with the felony offense of felonious driving under the influence and was not based on a sworn warrant or affidavit that disclosed the source of anyone's personal knowledge. He alleged that the indictment was not based on probable cause. Moreover, Defense Counsel contended that the evidence presented to the Grand Jury, the warrant and affidavit, failed to comport with the Fourth and Fourteenth Amendments to the United States Constitution (R-34-42). He contended that the evidence presented required a dismissal of the indictment. He then contended that the alleged prior guilty plea convictions relied upon by the State to obtain the warrant and indictment failed to disclose that Defendant had been appropriately represented by counsel and that the records or documents relied upon failed to affirmatively show that the guilty pleas were voluntarily given as required by the decision of Boykin v. Alabama, 395 U.S. 238 (1969) (R-58-60). Defense Counsel also alleged that he was prosecuted under an ex post facto law and was deprived of defenses that had existed prior to the passage of the felony statute, contrary to Article 1, § 9, Cl. 3, Constitution of the United States.

A deputy in the Montgomery County Sheriff's Office was also called as a State's witness (R-43-49). He testified that he had taken some scientific evidence from Mr. Ziegler at the jail and ran a test. He referred to the test as a Drager Test. However, he testified that he could not produce the authenticated results of the test. After such testimony Defense Counsel renewed his Motion to Dismiss and alleged that the evidence also failed to show that the Defendant was guilty of misdemeanor driving under the influence of alcohol or the offense charged under 32-5A-191 (a) and 32-5A-191 (h), Code of Alabama 1975 (R-58-60). He also alleged that he was prosecuted under an ex post facto law. The Trial Court denied Petitioner's Motion to Dismiss, found Petitioner guilty of felonious driving under the influence and set a Sentencing date of February 22, 2000.

Defense Counsel next filed a Motion for Judgment of Acquittal/To Vacate (R-87-95). The Petitioner alleged in his Motion for Judgment of Acquittal/To Vacate that the State's failure to produce a sworn warrant and affidavit based on a factual statement of someone's personal knowledge or the source of that personal knowledge, was insufficient to obtain a felony warrant in this case and that the presentation of such warrant and alleged affidavit to the Grand Jury failed the probable cause test. He contended that it was insufficient evidence upon which to base an indictment. He submitted that the presentation of this evidence to the Grand Jury of Montgomery County, Alabama, did not give the Grand Jury probable cause to indict Ziegler for the felony offense of DUI. Since he contended that the warrant and affidavit were both

void, he further alleged that these failures went to the jurisdiction of the Court. Defense Counsel again contended that the evidence of prior convictions obtained as a result of guilty pleas did not meet the evidentiary and Constitutional requirements of Boykin v. Alabama, 395 U.S. 238 (1969), and could not be used as an element for his felony indictment, conviction or to enhance punishment.

The Trial Court thereafter denied Petitioner's Motion For Acquittal/To Vacate and sentenced Petitioner to a term of five (5) years imprisonment, to be split under the Alabama Split Sentence Act. The Court ordered the Petitioner to serve eighteen (18) months imprisonment, two (2) years probation, imposed a fine of Forty-One Hundred ($4,100.00) Dollars and ordered revocation of Petitioner's driver's license for a period of five (5) years. Notice of Appeal was given and an Appeal Bond was set at Five Thousand ($5,000.00) Dollars (R-61). An Appeal was taken.

Petitioner also alleged at Trial and on Appeal that:

1. Ziegler was indicted by the Grand Jury sitting for the October Term, 1999 for "did drive or was in actual physical control of a vehicle while there was .08 percent or more by weight of alcohol in his blood, or while he was under the influence of alcohol, or while he was under the influence of a controlled substance to a degree which rendered him incapable of safely driving, or while he was under the combined influence of alcohol and a controlled substance to a degree which rendered him incapable of safely driving, or

while he was under the influence of any substance which impaired his mental or physical faculties to a degree which rendered him incapable of safely driving, in violation of Sections 32-5A-191 (a) and 32-5A-191 (h) of the *Code of Alabama, 1975*, as amended.

2. The indictment appears at C-5-6, the Complaint and Affidavit upon which the Grand Jury indicted Ziegler appear at C-9-10.

3. Ziegler filed a Motion to Continue Trial wherein Ziegler requested that the Court continue the Trial date in order for Ziegler to place the Attorney General of the State of Alabama on notice of the Challenge of the Constitutionality of various portions of the D.U.I. Statutes. Said Motion to Continue Trial appears at C-14 -15. Said Motion was granted. Ziegler filed a Motion to Suppress and Motion to Dismiss, which Motion to Suppress appears at C-16-18. In paragraph one of said Motion to Suppress Ziegler incorporated his Motion to Dismiss by reference thereto. In paragraph 5 of said Motion to Dismiss, appearing at C-17 of the Motion to Suppress, Ziegler argued that any prior D.U.I. offenses should be suppressed by reason of (a) double jeopardy (b) judicial estoppel (c) that the D.U.I. Laws violate due process of law guaranteed through the Fifth and Fourteenth Amendments of the *United States Constitution* (d) that Ordinance 32-5A-191(h) was a strict liability statute which also violated due process of law guaranteed by the Fifth and Fourteenth Amendments as well as State Constitutional provisions, as well as violated

constitutional prohibition against cruel and unusual punishment. Paragraph 14 of the Motion to Dismiss was the argument that 32-5A-191(h) and the doctrine of Judicial Estoppel barred the State from prosecuting Ziegler for a felony conviction by reason of the Department Public Safety and the prior 1997 Amendments to the D.U.I. laws wherein all traffic offenses older than five years were deleted from the driving record and could not be used against a defendant once a five-year period had past (C-23).

Paragraph 15 of the Motion to Dismiss stated that by reason of the pre-1997 five year limitations contained in the Judicial Estoppel argument, argued in Paragraph 14, that the 1997 amendment to the D.U.I. laws 32-5A-191(h) deprived a defendant of a defense previously existing under the law and therefore represented an ex post facto application of 32-5A-191(h) (C-23).

4. Notice to the Attorney General of the State of Alabama pursuant to 6-6-227, 1975, *Code of Alabama,* of challenge as to constitutionality of State Statute 32-5A-191 (a)(h) appears at C-34-C-40, pages C-36 through 40 being a Motion to Dismiss which was attached to the Notice to the Attorney General.

5. The State filed a Motion to Continue the trial date of December 14, 1999, which Motion to Continue appears at C-40-51). Ziegler filed a list of authorities in support of the Motion to Dismiss which appears at C-52-54). Ziegler filed a Motion in Limine and Motion under 14.6 which appears at C-55-57). Paragraph 5 of the Motion in Limine, motion under Rule 15.6

ARCP, requested that the State be prohibited from utilizing any prior D.U.I. convictions which were in excess of five years of age asking that the same not be utilized for enhancement purposes under 32-5A-191(h) based upon the principals of judicial estoppel and ex post facto as violating judicial principals as well as the Defendant' constitutional rights (C-56).

Paragraph 6 reiterated the fact that the pre-1997 D.U.I. statute could be construed as a statute of limitations where a conviction in excess five years of age cannot be used in a subsequent D.U.I. prosecution which in effect was made a statute of limitations. That 32-5A-191(h) was remedial could not be applied retroactively and was also violative of ex post facto principals and therefore unconstitutional (C-56).

7. Ziegler filed an Amended Motion to Dismiss which appears at C 58.73. Paragraph 4 of the Amended Motion to Dismiss stated that the defendant could not be charged with a third offense since the State had failed to produce two prior offenses occurring within a five year period. That the 1997 Amendment 32-5A-191(f) deals with a second conviction within a five year period, subsection (g) was amended by the 1997 Legislative Amendment which omitted the "within a five year period" provision, subsection (h) was the enhancement provision of the 1997 Amendment (C-58-59). Paragraph 5 of the Amended Motion stated that the omission of the "within a five year period" as to subsection (g) of 32-5A-191 required said subsection to be read with the prior statute for its failure to state the "within a five year period" limitation and thus Ziegler

requested that the State be prohibited from charging Ziegler with a third conviction within a five year period under 32-5A-191(g) (C-59-60). In said paragraph 7 appearing at page C-61 Ziegler argued that use of a conviction older than five years or the pre-1997 32-5A-191 contained the five year limitation period was violative of Section 95 of the *Alabama Constitution of 1901*. (C-61-63).

8. Ziegler's Motion for Judgment of Acquittal made pursuant to Rule 20.3 *Alabama Rules of Criminal Procedure* appears at C-87-95.

9. Ziegler's Appeal Bond appears at C-96-97.

10. The Notice of Appeal appears at C-98.

11. The Transcript of Record and Judgment appears at C-99.

12. The Reporters Transcript Order appears at C-100.

13. The Court of Criminal Appeals Docketing Statement appears at C-101-102.

14. The Reporters Transcript appears at C-103 of the transcript.

15. The Defendants Exhibits 1 and 2 appear at C-104-105.

16. The Certificate of Completion and Transmittal of Record on Appeal by the Trial Clerk appears at C-106.

17. A Hearing was conducted on November 29, 1999. The Transcript of which appears at R-2 through R-6. At page R-6 the Court reset the trial for December 13 to allow Ziegler to notify the Attorney General to place the Attorney General of the State of Alabama on notice so that the constitutional arguments were not waived.

18. The Defendant Crawford Ziegler, an appellant herein, waived his right to a jury trial at a November 29, 1999 hearing which appears at R-6.

19. At R-6 through 15 appears the argument on the Pretrial Motions at the pretrial conference held on December 8, 1999.

20. The bench trial of Ziegler appears at R-15 through R-63.

21. The Court denied the Motion to Dismiss made at the end of the State's case and found the Defendant guilty and set sentencing for February 22, 2000, at 9:00 a.m. (R-57) R-58-R-60 counsel for Ziegler argued Ziegler's's Motion for Judgement of Acquittal which was denied at R-60 by the Court line 8 and 9. Objection was made at the sentencing hearing as to the State's introduction of certified copies of prior D.U.I. convictions. The objection was that the prior D.U.I. convictions did not comply with *Boykin v. Alabama*. The Judge overruled said objection at Line 22, R-61. Ziegler was then sentenced at R-62 and R-63.

22. Verbal notice of appeal was made which appears at R-63 Lines 12-22 with the Court setting the appeal bond at $5,000.00 Lines 23-24 R-63. The Certificate of Completion of the Reporters Transcript appears at R-64.

The case was affirmed by the Court of Criminal Appeals of Alabama on February 23, 2001. An application for rehearing was denied on March 16, 2001. A Petition For A Writ of Certiorari to review the decision/judgment or order of the Alabama Court of Criminal Appeals was filed with the Alabama Supreme Court and denied on May 25, 2001. This Petition for a Writ of Certiorari is made within ninety (90) days of the Alabama Supreme Court's denial of Ziegler Petition For a Writ of Certiorari to the Alabama Court of Criminal Appeals.

REASONS FOR GRANTING THE WRIT

1. The Alabama Court of Criminal Appeals committed reversible error when it affirmed Petitioner's conviction and sentence below, because the felony indictment and warrant was not based on probable cause, contrary to the Fourth and Fourteenth Amendment to the United States Constitution. That is, no probable cause existed for authentication of four (4), or more, prior DUI guilty plea offenses, contrary to the Fourth Amendment probable cause requirements for issuance of indictment, warrants and no knowing and voluntary guilty pleas were shown to have been given by Petitioner, but were used as an element of his conviction under 32-5A-191 (a) and

32-5A-191 (h) *Code of Alabama* 1975, contrary to the Fourteenth Amendment Due Process requirement of the United States Constitution. Petitioner contends that this Court has held: the burden rest on the State to produce sufficient data to meet the probable cause requirement of the Fourth Amendment. See, e.g., Lo-Ji Sales, Inc. V. New York, 442 U.S. 319, 328 (1979); Giordenello v. United States, 357 U.S. 480 (1958); Johnson v. United States, 333 U.S. 10 (1948). Moreover, the State must show knowing and voluntary guilty pleas where they use the pleas as an element of a felony indictment, Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 LEd 2d 274 (1969). This is so because due process requirements cannot be lacking in any element of a criminal offense.

2. Whether the utilization of pre-1997 D.U.I. convictions older than 5 years for felony enhancement under 32-5A-191(h), represents a deprivation of a defense in violation of prohibition against passage of ex post facto laws under Federal and State Constitutional prohibitions?

Land v. Cooper 34 So 2d 313 (Ala 1948)

Tyson v. John Mansfield Sales Corp. 399 So 2d 263, 268, 269 (Ala 1981)

Article 95 Alabama Constitution

> [1] An ex post facto law imposes a punishment for an act which was not Punishable at the time it was committed or additional punishment to that previously prescribed, or deprives one of a defense available under the law at the time when the act was committed. *Weaver v. Graham*, 450 U.S. 24, 28,

101 S. Ct. 960, 963 67 L.Ed 2nd (1980); *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S. Ct. 68, 68-69, 70 L.Ed. 2d 216 (1925).

3. Additionally, counsel I the initial Motion to Dismiss, argued that 32-5A-191(h) was violative of Ziegler's constitutional rights, based upon due process notions, as well as based upon judicial estoppel where the prior statute (pre-1997) precluded prosecutions that were older than five (5) years. Counsel argued that this also deprived Ziegler of a defense and thus represented an ex post facto application of 32-5A-191(h) in going back over five (5) years.

4. The argument, likewise, involved a statute of limitations argument based upon the pre-1997 statute precluding prosecution of offenses older than five (5) years.

32-5A-191(h) attempts to revive actions previously precluded. *Land v. Cooper*, 34 So 2d 313 (Ala 1948) while a civil case addressed legislation that abated and revived actions previously precluded. The Court there held in Key Notes 4, 5, and 7 the following:

34 So.2d 313 (Ala. 1948) while a civil case addressed legislation that abated and revived actions previously precluded. The Court there held in Key Notes 4, 5 and 7 the following:

"[4] The legislature may not revive an action which has abated prior to passage of the statute. Gen. Acts

1947, p. 543; U.S.C.A. Const. Amends. 5, 14, §1.

[5] The due process clause prohibits retrospective legislation which would unfetter title by reviving a dead right to redeem from mortgage foreclosure. Gen. Acts 1947, p. 543; U.S.C.A. Const. Amends. 5, 14, §1.

[7] The legislature cannot arbitrarily recreate a right or liability already extinguished by operation of law, rights and obligations of parties having become fixed before the change of the law. Gen. Acts 1947, p. 543; U.S.C.A. Const. Amends. 5, 14, §1."

5. The use of a prior conviction older than five (5) years was prohibited under pre-1997 amendment to 32-5A-191 (and is still incorporated in (f) of the 1997 amendment). This was analogous to a statute of limitations or a bar against utilization of the prior offense to increase punishment for a second or third conviction (or more) with a five (5) year period.

6. The Alabama Legislature, with the 1997 amendment, is, therefore, recreating an offense utilizing prior offenses which, prior to 1997, could not be utilized unless within a five (5) year period. This, in effect, abates and revives the prior offenses older than five (5) years for use in enhancement.

7. This is violative of Section 95, Alabama Constitution, and is violative of due process under the Fifth and Fourteenth Amendments to the Constitution.

Tyson v. Johns Manville Sales Corp., 399 So.2d 263, 268, 269 (Ala. 1981) states:

> A. *Constitutionality under §95 of the Alabama Constitution.*
>
> Section 95 of the Alabama Constitution of 1901 states in pertinent part that 'the legislature shall have no power to revive any right or remedy which may have become barred by lapse of time, or by any statute of this state. After suit has been commenced on any cause of action, the legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit.'...
>
> [3-6] It is true that the legislature has the inherent power to determine the period within which an action may be brought, provided that the time fixed is reasonable. *Sellers v. Edwards*, 289 Ala. 2, 265 So.2d 438 (1972); *Plant v. Reid, Inc.*, 294 Ala. 155, 313 So.2d 518 (1975). It also has the power to retroactively alter, extend, or curtail an existing limitations period. However, this power 'can only be exercised so as to apply . . . where the bar was not complete before the enactment of the statute, for, if the action was . . . barred [before enactment], its effect would be to revive a cause of action already barred and would violate §95....' *Floyd v. Wilson*, 171 Ala. 139, 141, 54 So. 528 (1911); see, *Martin v. Martin*, 35 Ala. 560 (1860). Such a statute may be made applicable to 'an existing cause of action *not*

then barred, provided it is clear that it was intended to be retroactive....' *Cronheim v. Loveman*, 225 Ala. 199, 201, 142 So. 550 (1932). [Emphasis added.] However, the Act cannot be permitted to apply retroactively to claims, such as the ones at hand, which had not been brought within one year of the date of last exposure and which, therefore, had been barred under the statute of limitations in existence at the time the action was commenced, because such application would revive a time-barred remedy in contravention of §95.

...

[8-10] We also hold that, as applied to these time-barred claims, Act No. 80-566 offends the 'existing defense' provisions of §95. We have held that this provision applies 'only to matters of substance and not to matters of form or to statutes which are remedial in nature;' that "'no person has a vested right in a particular remedy... or in particular modes of procedure'," *State Board of Optometry v. Lee Optical Company of Alabama*, 284 Ala. 562, 565-566, 226 So.2d 623 (1969); and that a statute of limitations is a remedial statute that does not destroy any vested rights, *Barrington v. Barrington*, 200 Ala. 315, 76 So. 81 (1917). However, we have not heretofore addressed the question of whether the running of a statute of limitations creates a vested right in that defense. The weight of American authority holds that the bar does create a vested right in the defense.

Although there is some authority to the contrary with regard to actions which do not involve or affect title to property, the great preponderance of authority favors the view that one who has become released from a demand by the operation of the statute of limitation is protected against its revival by a change in the limitation law.

> *According to this view, after a cause of action has become barred by the statute of limitations the defendant has a vested right to rely on that statute as a defense, the defense in such case being considered a vested right or property which cannot be taken away by legislation... Especially is such legislation invalid if the removal of a completed statutory bar is prohibited by the state constitution.*

51 Am.Jur.2d *Limitation of Actions*, §44 (1970) (footnotes omitted, emphasis added). See also, *Dobson v. Quinn Freight Lines*, 415 A.2d 814 (Me. 1980); Hockman, 'The Supreme Court and the Constitutionality of Retroactive Legislation,' 73 Harv.L.Rev. 695, 696 (1960); Smith, 'Retroactive Laws and Vested Rights,' 5 Texas L.Rev. 231, 242-244, 248 (1927).

[11] In the closely related area of ex post facto legislation, cases and authorities are 'in agreement that if the statutory period of the statute has fully run and the bar has once attached so that the defendant could

not be prosecuted under the existing statute, the law cannot be changed by future legislation so as to extend the period of limitation as to past offenses, already barred. Such a law would violate the ex post facto clause.' Black, 'Statutes of Limitation and the Ex Post Facto Clauses,' 26 Kentucky Law Journal 41, 42 (1937); *Moore v. State*, 43 N.J.L. 203 (1881); *Falter v. United States*, 23 F.2d 420 (1928)."

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the judgment below reversed. The Petitioner requests that this Petition be granted, this judgment of conviction reversed and that this Court enter an Order excluding all evidence seized.

Respectfully submitted,

CRAWFORD ZIEGLER, III
418 Scott Street
Montgomery, Alabama 36104
(334) 263-9810

APPENDIX A

STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE COURT OF CRIMINAL APPEALS

Crawford Ziegler, III. v. State

McMillan, Presiding Judge

The appellant appeals from his 1999 conviction of felony DUI, a violation of § 32-5A-191 (a) and (h), Ala. Code 1975. He was sentenced to five years' imprisonment, split to serve eighteen months' actual imprisonment, followed by two years' supervised probation. Additionally, the trial court revoked the appellant's driver's license for a period of five years.

I.

The appellant argues that the trial court lacked jurisdiction to hear his case because his prosecution was based upon an insufficient affidavit. Specifically, he argues that the affidavit of the arresting officer, Trooper Scott Duncan, was insufficient because he lacked personal knowledge regarding the appellant's prior DUI convictions that were the basis of the charge of felony DUI. In support of his argument, he contends that the arresting officer must have personal knowledge regarding the defendant's prior DUI convictions in order to sign a complaint on felony DUI.

The appellant's arguments are without merit because they are unsupported by any legal authority. Moreover, the record reveals that there was a sufficient factual basis to support the issuance of the indictment. Cf. Ex parte Crittenden, 476 So. 2d 632 (Ala. 1985). The factual basis consisted of Trooper Duncan's complaint based on his April 1999 arrest of the appellant for DUI, in addition to official police records regarding the appellant's three prior DUI convictions. No error occurred here.

II.

The appellant argues that the State is prohibited under the principle of judicial estoppel from using his pre-1997 DUI convictions to convict him of felony DUI under § 32-5A-191 (h), Ala. Code 1975. More particularly, he argues that the State, prior to the 1997 amendment of § 32-5A-191 (h), could not use traffic offenses that were more than five years old in convicting a defendant of DUI. Additionally, he argues that the State's use of his pre-1997 DUI convictions as applied is violative of the constitutional prohibition against ex post facto laws, by elevating his crime of DUI to felony DUI.

Under the 1997 amendment of §32-5A-191(h), Ala. Code 1975, the legislature elected to change the law with respect to the treatment of prior DUI convictions. In Ex parte Parker, 740 So. 2d 432 (Ala. 1999), and Ex parte Formby, 750 So. 2d 587 (Ala. 1999), the Alabama Supreme Court stated that the legislative intent in enacting § 32-5A-191 (h) was to create an enhancement provision aimed at making Alabama's DUI law

more enforceable and to identify and keep the drinking driver off the highway. Subsequently, the State is required to follow the amended law, and consider all of the defendant's prior DUI convictions, including those that did not occur within the five-year period. See also Shaver v. State, [CR-98-1332, Oct. 29 1999] ___ So. 2d ___(Ala. Crim.App. 1999). Moreover, the appellant, at the time he committed the instant offense, was charged by law with the knowledge that if he was convicted of the offense, having had three prior DUI convictions, the charge would be elevated to felony DUI. Cf. Chambers v. State, 418 So. 2d 948, 950 (Ala.Crim.App. 1982). ("Consideration of a defendant's prior convictions in sentencing him pursuant to the Habitual Offender Act does not give the act efficacy as a constitutionally prohibited ex post facto law, even though such prior convictions occurred before the effective date of the act.") The State correctly invoked the appellant's prior DUI convictions, pursuant to § 32-5A-191 (h), in convicting him of felony DUI.

III.

The appellant argues that the trial court erred in allowing the State to use his prior uncounseled municipal court convictions in enhancing his felony DUI conviction. In support of his argument, he contends that the waiver of counsel form that he signed in two of his prior DUI convictions did not comport with the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), and therefore, the State failed to show that his waiver of counsel was voluntary.

An examination of the record reveals that the trial court correctly allowed the State to introduce the appellant's prior convictions for purposes of enhancement under § 32-5A-191 (h), because the record affirmatively demonstrated that the appellant voluntarily waived counsel on the two prior convictions. Cf. Ex parte Thrasher, [Ms. 1990568, August 11, 2000] ____ So.2d ____ (Ala. 2000) (The State is not required to prove that the defendant waived counsel in a municipal court conviction for DUI if a jail term was not imposed.) Moreover, if the appellant seeks to challenge his prior convictions based upon the voluntariness of his guilty pleas, the proper vehicle would be a Rule 32 petition for post-conviction relief, filed in the court of conviction for the conviction being challenged. Sturdivant v. State, 643 So. 2d 1013 (Ala.Crim.App. 1993); Rule 32, Ala.R.Crim.P.

IV.

The appellant argues that he was improperly convicted of felony DUI because the State failed to prove that two of his three prior DUI convictions occurred within five years, are required by § 32-5A-191 (f), Ala. Code 1975. He argues that a reading of §§ 32-5A-191 (g), and (h), when construed in para materia, with § 32-5A-191 (f), indicates that it was the legislature's intent that two of his prior DUI convictions must have occurred within five years, in order for his sentence to be enhanced under subsections (g) and (h) of the Act.

Section 32-5A-191(f), (g), and (h), Ala. Code 1975 provides in pertinent part as follows:

(f) On a second conviction within a five-year period, a person convicted of violating this section shall be punished by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand one hundred dollars ($5,100) and by imprisonment, which may include hard labor in the county or municipal jail for not more than one year. The sentence shall include a mandatory sentence, which is not subject to suspension or probation, of imprisonment in the county or municipal jail for not less than 48 consecutive hours or community service for not less than 20 days. In addition the Director of Public Safety shall revoke the driving privileges or driver's license of the person convicted for a period of one year.

(g) On a third conviction, a person convicted of violating this section shall be punished by a fine of not less than two thousand one hundred dollars ($2,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment, which may include hard labor, in the county or municipal jail for not less than 60 days or than one year, to include a minimum of 60 days which shall be served in the county or municipal jail and cannot be probated or suspended. In addition, the Director of Public Safety shall revoke the driving privilege of driver's license of the person convicted for a period of three years.

(h) On a fourth or subsequent conviction, a person convicted of violating this section shall be guilty of a Class C felony and punished by a fine of not less than four thousand one hundred dollars ($4,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment of not less than one year and one day nor more than 10 years. Any term of imprisonment may include hard labor for the county or state, and where imprisonment does not exceed three years confinement may be in the county jail. Where imprisonment does not exceed one year and one day, confinement shall be in the county jail. The minimum sentence shall include a term of imprisonment for at least one year and one day provided, however, that there shall be a minimum mandatory sentence of 10 days which shall be served in the county jail. The remainder of the sentence may be suspended or probated, but only if as a condition of probation the defendant enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court. Where probation is granted, the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probation term. In addition to the other penalties authorized, the Director of Public Safety shall revoke the driving privilege or driver's license of the person convicted for a period of five years...."

"The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. When interpreting a statute, we must consider it as a whole and must construe it reasonably so as to harmonize all of its provisions." James v. McKinney, 729 So. 2d 264, 267 (Ala. 1998) (citations omitted.) Just as statutes dealing with the same subject are in pari materia and should be construed together, parts of the same statute are in pari materia and each part is entitled to equal weight. See Lambert v. Wilcox County Commission, 623 So. 2d 727 (Ala. 1993). Additionally, when the statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by the clear pronouncement.
Ex parte Burch, 730 So.2d 143 (Ala. 1999).

Here, a clear reading of the language used in § 32-5A-191, giving equal weight to each of its sections, indicates that the Legislature, in adopting the 1997 amendments to the statute, intended to remove the five-year limitations period from subsections (g) and (h) in an attempt to impose a harsher penalty upon the habitual drunk driver.
The record indicates that the State sufficiently proved that the appellant had three prior DUI convictions which could be used as a sentence enhancement to invoke felony punishment on his fourth conviction and, therefore, it me its burden of proof for sentence enhancement purposes.

V.

The appellant argues that the indictment in this case was illegal and voidable because it improperly charged him with both a misdemeanor and a felony.

The indictment reads as follows:

> "Crawford Ziegler, III, alias, Crawford Ziegler, whose name is otherwise unknown to the Grand Jury, did drive or was in actual physical control of a vehicle while there was .08 percent or more by weight of alcohol in his blood, or while he was under the influence of alcohol, or while he was under the influence of a controlled substance to a degree which rendered him incapable of safely driving, or while he was under the combined influence of alcohol and a controlled substance to a degree which rendered him incapable of safely driving, or while he was under the influence of any substance which impaired his mental or physical faculties to a degree which rendered him incapable of safely driving in violation of Sections 32-5A-191 (a) and 32-5A-191 (h) of the Code of Alabama as amended."

The indictment did not charge the appellant with both a misdemeanor and a felony, but rather, put him on notice that, if convicted of a fourth DUI, h is sentence would be elevated to

a felony as opposed to a misdemeanor. See Ex parte Shaver, supra; Casey v. State, 740 So. 2d 1136 (Ala.Crim.App. 1998).

The judgment of the trial court is affirmed.

AFFIRMED.

Cobb, Shaw and Wise, JJ., concur. Baschab, J., concurs in the result.

APPENDIX B

COURT OF CRIMINAL APPEALS

CR-99-1006

Hon. Melissa Rittenour, Circuit Clerk
Hon. Jean Therkelsen, Asst. Atty. Gen.
Hon. Donald Gordon Madison, Atty.

RE: CR-99-1006
Crawford Ziegler, III v. State of Alabama (Appeal From Montgomery Circuit Court: CC-99-1755).

Dear Sir or Madam:

You are hereby notified that on March 16th, 2001 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled.

Lane W. Mann
Clerk
Court of Criminal Appeals

LWN/lk

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

May 25, 2001

1001136

Ex parte Crawford Ziegler, III. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Crawford Ziegler, III v. State of Alabama) (Montgomery Cir.Ct.No.: CC-99-1755) (Low'r.App.Ct.No: CR-99-1006)

CERTIFICATE OF JUDGMENT
Writ Denied

==========

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied for lack of compliance with Rule 39, Alabama Rules of Appellate Procedure. NO OPINION.

COSTS TAXED TO PETITIONER.

STUART, J. - Moore, C.J., and See, Brown and Harwood, JJ., concur.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 25th day of May, 2001.

s/ _____

ROBERT G. ESDALE, SR.
Clerk, Supreme Court of Alabama

APPENDIX D

CODE OF ALABAMA 1975, as amended

§ 32-5A-191. **Driving under the influence.**

(a) A person shall not drive or be in actual physical control of any vehicle while:

(1) There is 0.08 percent or more by weight of alcohol in his or her blood;

(2) Under the influence of alcohol;

(3) Under the influence of a controlled substance to a degree which renders him or her incapable of safely driving;

(4) Under the combined influence of alcohol and a controlled substance to a degree which renders him or her incapable of safely driving; or

(5) Under the influence of any substance which impairs the mental or physical faculties of such person to a degree which renders him or her incapable of safely driving. .....

(f) On a second conviction within a five-year period, a person convicted of violating this section shall be punished by a fine of not less than one thousand one hundred dollars ($1,100) nor more than five thousand one hundred dollars ($5,100) and by imprisonment, which may include hard labor in the county or municipal jail for not more than one year. The

sentence shall include a mandatory sentence, which is not subject to suspension or probation, of imprisonment in the county or municipal jail for not less than 48 consecutive hours or community service for not less than 20 days. In addition the Director of Public Safety shall revoke the driving privileges or driver's license of the person convicted for a period of one year.

(g) On a third conviction, a person convicted of violating this section shall be punished by a fine of not less than two thousand one hundred dollars ($2,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment, which may include hard labor, in the county or municipal jail for not less than 60 days nor more than one year, to include a minimum of 60 which shall be served in the county or municipal jail and cannot be probated or suspended. In addition, the Director of Public Safety shall revoke the driving privilege or driver's license of the person convicted for a period of three years.

(h) On a fourth or subsequent conviction, a person convicted of violating this section shall be guilty of a Class C felony and punished by a fine of not less than four thousand one hundred dollars ($4,100) nor more than ten thousand one hundred dollars ($10,100) and by imprisonment of not less than one year and one day nor more than 10 years. Any term of imprisonment may include hard labor for the county or state, and where imprisonment does not exceed three years confinement may be in the county jail. Where imprisonment does not exceed one year and one day, confinement shall be in the county jail. The minimum sentence shall include a term of

imprisonment for at least one year and one day which may be suspended or probated, but only if the defendant enrolls and successfully completes a state certified chemical dependency program recommended by the court referral officer and approved by the sentencing court. Where probation is granted, the sentencing court may, in its discretion, and where monitoring equipment is available, place the defendant on house arrest under electronic surveillance during the probationary term. In addition to the other penalties authorized, the Director of Public Safety shall revoke the driving privilege or driver's license of the person convicted for a period of five years.

Any law to the contrary notwithstanding, the Alabama habitual felony offender law shall not apply to a conviction of a felony pursuant to this subsection shall not be a felony conviction for purposes of the enhancement of punishment pursuant to Alabama's habitual felony offender law.